IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Mark Hughey,	)	
	)	
Plaintiff,	)	C/A No. 2:95-3520-18AJ
	)	
vs.	)	
	)	
	)	**ORDER**
Miles Inc. and Bayer Corp.,	)	
	)	
Defendants.	)	
	)	
	)	

This matter is before the court upon the magistrate judge's recommendation that Defendant Bayer's ("Defendant")[1] Motion for Summary Judgment be granted in part and denied in part. This record includes a report and recommendation of the United States Magistrate Judge made in accordance 28 U.S.C. § 636(b)(1)(B).

I. TIME FOR FILING OBJECTIONS

A party may object, in writing, to a magistrate judge's report within ten days after being served with a copy of that report. 28 U.S.C. § 636(b)(1). Three days are added to the ten day period if the recommendation is mailed rather than personally served. The magistrate judge's report and recommendation was filed on February 28, 1997. Plaintiff

[1] Bayer Corporation was formerly Miles Incorporated, and Miles Incorporated was formerly known as Mobay Incorporated. This court will refer to "Defendant" instead of "Defendants."

filed his timely written objections with the court on March 13, 1997. Defendant also filed timely objections with the court on March 17, 1997.

II. REVIEW OF MAGISTRATE JUDGE'S REPORT

This court is charged with conducting a de novo review of any portion of the magistrate judge's report to which a specific objection is registered and may accept, reject, or modify, in whole or in part, the recommendations contained in that report. 28 U.S.C. § 636(b)(1). Plaintiff objects to the magistrate judge's conclusions that Plaintiff did not have an employment contract with Bayer and that Plaintiff does not have a claim for breach of the implied covenant of good faith and fair dealing. Defendant objects to the magistrate judge's determination that a genuine issue of fact exists concerning Plaintiff's national origin discrimination claim. Defendant also raises the issue of Plaintiff's indirect retaliation claim, which the magistrate judge did not address.

A. Plaintiff's Objections

a. breach of contract claim

Plaintiff asserts that Defendant's written termination policies constituted an employment contract which altered his employment-at-will status. The traditional at-will employment relationship may be altered where the employer issues a handbook or other written policy. Small v. Springs Industr.,

Inc., 357 S.E.2d 452, 455 (S.C. 1987)(Springs I). Under certain circumstances, the handbook may create a limiting agreement on the employee's at-will status. Id.

Because a contract of employment is no different than any other type of contract, the court must look to general principles of contract law to analyze Plaintiff's claim of breach of an employment contract. Taylor v. Cummins Atlantic, Inc., 852 F. Supp. 1279, 1285 (D.S.C. 1994), aff'd, 48 F.3d 1217 (4th Cir.), cert. denied, 116 S.Ct. 176 (1995)(citation omitted)(determining the conclusions in Springs I are unquestionably based on principles of contract law, specifically unilateral contract principles).

An action for damages on a breach of an employment contract claim is predicated on the existence of a contract. Id. (citation omitted). The essential elements of a contract are an offer, an acceptance, and valuable consideration. Id. It is elemental that before a party can recover for the breach of a contract, he must allege and prove by competent, relevant testimony each one of the material elements of the contract sued on. Id.

There are two different policies Plaintiff emphasizes. The pertinent portions of one of the written termination procedures, contained in Policy No. 33, are as follows:

> **Purpose** -- To establish uniform policies and consistent procedures to be followed regarding the termination of salaried employees . . .
>
> Should reductions in force become necessary, whether temporary (lay-offs) or permanent force reductions (terminations), they will be arranged with fairness and consideration for all employees and the Company's need to effectively operate the business.

(Mobay Corp., Bushy Park Plant Policy No. 33, Termination policy, Exhibit S, beginning paragraph).

Defendant essentially argues that it did not make an offer to Plaintiff to alter his at-will employment status. First, Defendant contends the policy manuals which contained Policy No. 33 were recalled and discarded. (Motion for Summary Judgment, p. 20). Defendant asserts the manuals were superseded by new employment policies in 1993 after Mobay was merged into Miles, Inc. (Motion for Summary Judgment, p. 20). An employee handbook may be modified by a subsequent employee handbook provided the employee is given actual notice of the modification of the handbook. King v. PYA/Monarch, Inc., 453 S.E.2d 885, 888 (S.C. 1995); Fleming v. Borden, 450 S.E.2d 597 (S.C.Ct.App. 1994).[2]

In his deposition, Plaintiff states that Policy No. 33 was one of two policies of which he was aware. (Plaintiff Depo., p. 50). Plaintiff also indicates he did not know if

[2] Although King and Fleming involve modifications of earlier handbooks, this court believes the same analysis applies to replacements of earlier handbooks.

Policy No. 33 had been replaced by a later policy, but that a later policy came out after Policy No. 33. (Plaintiff Depo., p. 50). Plaintiff's testimony indicates he did not have actual notice that Policy No. 33 had been replaced by a later policy. Accordingly, this court will presume, for purposes of Defendant's Summary Judgment Motion, that Policy No. 33 applied to Plaintiff.

However, despite Policy No. 33 applying to Plaintiff, this court agrees with Defendant and the magistrate judge that the language in the policy is not sufficiently definite to create an employment contract. See Grooms v. Mobay, 861 F. Supp. 497, 506 (D.S.C. 1991), aff'd, 993 F.2d 1537 (4th Cir.), cert. denied, 510 U.S. 996 (1993); cf. Shelton v. Oscar Mayer Foods Corp., 459 S.E.2d 851 (S.C.Ct.App. 1995), cert. denied, ___ S.E.2d ___, Op. No. 24580 (Feb. 18, 1997).

The language in Policy No. 33 is virtually identical to that in Grooms, where this court determined the reduction in force language was too vague and ambiguous to create a contract. Nonetheless, Plaintiff urges this court to follow Shelton, arguing Shelton mandates a different outcome.

In Shelton the court was faced with determining whether the company's handbook language, when referring to the rules of conduct, created an employment contract. The handbook stated: "These rules are a fair way to protect everyone and

the company will [en]sure that these rules will be enforced fairly and equally with regard to all employees." Id. at 856. The court concluded that "[t]his is not a case where the employer had merely made general, gratuitous assurances of fair dealing, as (defendant) would have us hold. See e.g., Mills v. Leath, 709 F. Supp. 671, 674 (D.S.C. 1988)(holding handbook language that stated 'disciplinary actions taken against employees are fair, equitable and consistent in all departments' did not alter the employee's at-will status.)" The court determined the language was couched in mandatory terms, expressly guaranteeing that the employer would implement and adhere to the rules outlined, and could amount to an employment contract.

Plaintiff's case is more analogous to Grooms. The language in Policy No. 33 indicates a general assurance of fair dealing. Policy No. 33 does not include, as did the case in Shelton, mandatory language guaranteeing Defendant will follow an outlined set of rules. Rather, the language indicates that, when a reduction in force becomes necessary, the company will make attempts to be fair to the employee and the company. This language is not mandatory nor does it otherwise require the company follow a set of rules.

Even if Plaintiff could establish that Defendant's policy contained sufficiently mandatory language to be an offer for

a contract of employment, he cannot show that he accepted any offer. See Springs I, 357 S.E.2d at 454(determining that plaintiff's action or forbearance in reliance on defendant's promise was sufficient consideration to make the promise legally binding). Despite awareness of Policy No. 33, Plaintiff testified that he did not believe the policy applied to him. (Plaintiff Depo., p. 62-64). Because Plaintiff did not believe Policy No. 33 applied to him, he cannot claim he relied upon it to form an employment contract with Defendant.

There is another policy containing provisions which should also be considered. Bayer's current Policy 8.2, which discusses "involuntary terminations" provides in relevant part:

> The Company may initiate the termination of employment for various reasons. Termination of employment is a serious action and supervisors and human resources representatives are advised to follow the procedures outlined in this practice.

Policy 8.3 addresses Staff Reductions:

> The company may decide to reduce its work force because of business conditions, reassignments or reducing or phasing out certain operations.
>
> When a reduction in staff becomes necessary: Identify positions to be affected. Generally, the most important factors are job qualifications and performance; however, length of service is also a significant factor. Eliminate temporary employees and contract personnel . . . . Review reassignment opportunities for affected employees. Efforts are made to reassign affected salaried employees to existing vacancies at the site for which they are qualified.

The language in Policy 8.2 does not create an employment contract. Despite the evolution of handbook law, "advising" a supervisor to follow rules is not a promise or mandate sufficient to create a contract. Cf. King, 453 S.E.2d at 888 (finding that manual which states procedures "are to be followed," that company is to "abide by the policies and procedures," and that disciplinary action "will be in accordance with 'established policy'" created a contract of employment).

The language in Policy 8.3 does not create an employment contract. Policy 8.3 contains the procedure Plaintiff alleges Defendant was required to and did not follow. This court cannot conclude that words or phrases such as "may decide," "when a reduction in staff becomes necessary," "generally," and "efforts are made," are promissory or otherwise sufficient to create an employment contract.

b. breach of implied covenant of good faith and fair dealing

In absence of an employment contract altering the at-will relationship between Plaintiff and Bayer, no breach of the implied covenant of good faith and fair dealing claim can lie against Bayer. Hindman v. Greenville Hosp. Sys., 947 F. Supp. 215, 226 (D.S.C. 1996)(citing Grooms v. Mobay, 861 F. Supp. 497 (D.S.C. 1991), aff'd, 993 F.2d 1537 (4th Cir.

1993)(per curiam)); Witt v. American Trucking Assocs., Inc., 860 F. Supp. 295 (D.S.C. 1994);

B. Bayer's Objections

a. national origin discrimination claim

As the magistrate judge indicated, the parties agree, for summary judgment purposes, Plaintiff has made out a prima facie case and Bayer has offered a legitimate non-discriminatory business reason for Plaintiff's termination. See St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993) (delineating proof scheme in discriminatory termination claim). However, the analysis does not end here. After the defendant has offered a legitimate non-discriminatory reason for the plaintiff's termination, the presumption of discrimination drops out of the picture and the plaintiff bears the ultimate burden of proving both that the employer's asserted reason was pretextual and that the plaintiff's national origin was the true reason for the adverse employment action. Id. Pretext alone, however, does not automatically demonstrate purposeful discrimination. Id. The fact finder must decide not whether the evidence of rebuttal is credible, but whether there has been intentional discrimination.

> [T]he defendant's "production" (whatever its persuasive effect) having been made, the trier of fact proceeds to decide the ultimate question: whether plaintiff has proven "that the defendant intentionally discriminated against [him]" because of his race. The factfinder's disbelief of the reasons put forward by the defendant

> (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination, and the Court of Appeals was correct when it noted that, upon such rejection, "[n]o additional proof of discrimination is required.

St. Mary's Honor Center, 509 U.S. at 502.

The magistrate judge emphasized a personnel document titled "FOREIGN ASSIGNMENT APPROVAL BAYER EMPLOYEES TO MOBAY ASSIGNMENT APPROVAL REQUEST" and certain comments made by Paul Franklin, Human Resources Director for Bayer and one of the decision makers as to who would be retained after the reduction in force. (Plaintiff's app. Tab J; Franklin Depo., p. 31) The comment section of this personnel document states, "Mr. Bewerunge is planning and would like to retire in the US because of his wife being an American. We will try to accommodate this plan if we can based on our construction activity."

When questioned whether this document contained a request to try to let Mr. Bewerunge stay at the Bushy Park plant until he retires because that is what he wanted to do, Mr. Franklin stated: "No, I don't see a request to that. I see a statement saying that Mr. Bewerunge is staying and would like to remain in the U.S. because of his wife being an American, but I don't see it other than that. It's not a request." The magistrate

judge concluded that the fact finder could infer discriminatory intent from the document and Mr. Franklin's comments.

However, this document, while undated, was necessarily prepared five years before the reduction in force,[3] and was prepared by the vice-president for Central Engineering for Bayer, an individual who had no association with the reduction in force, or even with the Bushy Park plant. The form indicated the company would "try to accommodate" Bewerunge's plan, which does not suggest a bias based upon national origin.

Furthermore, there is no evidence the decision-makers took the personnel document into account when reducing the staff. On the contrary, Paul Franklin testified that he did not interpret this form as a request to retain Bewerunge at the plant. More importantly, the document was expressly rejected by the Corporate Personnel Committee, as reflected in a document containing excerpts from the January 8, 1990 corporate minutes: "The Committee emphasized that approval of this transfer does not imply continuation of employment with

[3] Mr. Bewerunge was assigned to the Bushy Park plant in January 1990 (Bewerunge Depo., pp. 14-15), so this document would necessarily have been prepared earlier than that.

Mobay upon conclusion of the assignment. It is anticipated that Mr. Bewerunge will return to Bayer at its conclusion." (Bewerunge Depo. exh. 14, tab 3 of Defendant's Objections). The document containing the "rejection" was copied to Mr. Franklin. This court cannot conclude that the personnel document and Mr. Franklin's comments permit an inference that Plaintiff's lay-off, five years after the form was prepared and rejected, was because of his national origin.

The magistrate judge did not state any other basis for denying Defendant's Motion for Summary Judgment with respect to Plaintiff's national origin discrimination claim, nor does the record disclose one. However, as further evidence of discriminatory intent, Plaintiff argued he was better qualified than the persons retained.

In support of his assertion, Plaintiff deposed several witnesses who had no involvement in the decision-making process and questioned them as to whether they believed Plaintiff, Bewerunge, or Stephen Hines was the best construction superintendent. These opinions are not sufficient to indicate pretext. Courts have emphasized that the opinions of the decision-makers as to the relative quality of the employees' performance are the ones that count, not

those of the plaintiff or other employees.[4] E.g., Conkwright v. Westinghouse Electric Corp., 933 F.2d 231 (4th Cir. 1991); Smith v. Flax, 618 F.2d 1062, 1067 (4th Cir. 1980); Hamalainen v. Mister Grocer Corp., 735 F. Supp. 1025, 1029 (S.D. Fla. 1990); Kilgore v. Sears, Roebuck & Co., 722 F. Supp. 1535, 1541 (N.D. Ill. 1989); McGough v. Bethenergy Mines, Inc., 837 F. Supp. 708, 711 (W.D. Pa. 1993), aff'd, 30 F.3d 1487 (3d Cir. 1994). Accordingly, the testimony from non-decision makers cannot demonstrate a fact issue as to whether Defendant acted with discriminatory intent.

b. retaliation claim

Defendant also expresses concern that the magistrate judge did not address Plaintiff's retaliation claim. While not the subject of a separate count in the Complaint, Plaintiff alleges he has been refused certain jobs for which he has applied since his lay-off in retaliation for filing a charge and complaint of discrimination.

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[4] Even if they were relevant, the variety of opinions of Plaintiff's co-workers tends to corroborate, rather than refute, the opinion of the decision-makers that Plaintiff, Bewerunge, and Hines were essentially equally skilled. For example, Dixon Darby, a Project Engineer, determined that Plaintiff and Bewerunge were "equally qualified," but that Plaintiff was better qualified than Hines, the American national. (Darby Depo., pp. 21-22). Carl Lindler, a retired Project Engineer, said each was better than the other at certain things. When asked who was better qualified, he said, "That's a hard question." (Lindler Depo., p. 12).

First, in his Opposition to Defendant's Motion for Summary Judgment, Plaintiff does not submit any argument or evidence addressing the retaliation claim. This leads the court to conclude Plaintiff has conceded summary judgment for Defendant is appropriate on this claim.

Second, a prima facie case of unlawful discrimination requires, among other things, that Plaintiff establish a causal connection between his protected activity (filing a charge and complaint) and the adverse employment action (denial of jobs). McNairn v. Sullivan, 929 F.2d 974, 980 (4th Cir. 1991); Green v. Clarendon County School District Three, 923 F. Supp. 829, 843 (D.S.C. 1996). As indicated above, once a plaintiff makes out his prima facie case, the employer must articulate its reasons for the adverse action and the plaintiff must demonstrate that he has evidence from which a jury could infer intentional discrimination.

Plaintiff's only basis for alleging retaliation is that he applied for several jobs and was not hired. (Plaintiff Depo., pp. 129-31). His own testimony indicates his lack of qualifications for a number of the positions he sought. (Plaintiff Depo., pp. 129-30). Thus, it is unlikely Plaintiff can establish the causal element of a prima facie case of retaliation.

Even if Plaintiff could establish a causal connection between his charge and complaint of discrimination, Defendant has a legitimate, non-discriminatory explanation. Defendant has explained that the jobs for which Plaintiff applied were filled from within the company. By practice, Defendant gives preference to current employees in filled posted jobs. (Franklin Depo., pp. 68-71). Plaintiff has not presented any evidence to permit an inference of discriminatory intent. Accordingly, this court concludes summary judgment for Defendant is appropriate on the retaliation claim.

III. CONCLUSION

To the extent that it is not inconsistent with this Order, the magistrate judge's report is incorporated herein. For the reasons set forth in detail above and by the magistrate judge, it is therefore,

ORDERED that Defendant's Motion for Summary Judgment be **GRANTED**,

AND IT IS SO ORDERED.

DAVID C. NORTON
UNITED STATES DISTRICT JUDGE

March ___, 1997
Charleston, South Carolina

NOTICE OF RIGHT TO APPEAL

Plaintiff is hereby notified that he has the right to appeal this order within thirty (30) days from the date hereof, pursuant to Fed. R. App. P. 3-4.